Supreme Court, U.S.
FILED
JUN 8 1993
OFFICE OF THE CLERK

No. 92-1859

In The

Supreme Court of the United States

October Term, 1992

GEORGE KRAWSHUK,

Petitioner,

v.

ROBERT E. HOUSTON and
LEE ANN HOUSTON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

I. WAS PETITIONER'S APPEAL TIMELY FILED?

II. WERE THE PETITIONER'S DUE PROCESS RIGHTS VIOLATED WHERE JUDGMENT WAS ENTERED IN OPEN COURT IN THE PRESENCE OF HIS COUNSEL, AND HIS COUNSEL DID NOT OBJECT TO THE ENTRY OF JUDGMENT NOR BRING HIS ALLEGED DEFENSES TO THE ATTENTION OF THE COURT?

III. DOES THE PETITIONER HAVE STANDING TO BE HEARD WHERE HE FAILED TO TAKE A TIMELY APPEAL FROM THE ENTRY OF A JUDGMENT OF FORECLOSURE AND THEREAFTER CONVEYED HIS INTEREST IN THE SUBJECT PROPERTY TO A THIRD PARTY?

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RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Respondents, Robert E. Houston and Lee Ann Houston, respectfully request this Court to deny the petition for a writ of certiorari to the Connecticut Supreme Court.

OPINIONS BELOW

The notice of judgment of the trial court is reprinted at Appendix B of this brief. The order of the Connecticut Appellate Court dismissing the Petitioner's appeal and denying his motion for reconsideration are printed as pages A-3 and A-4, respectively, in the petition. The order of the Connecticut Supreme Court denying the petition for certification to appeal from the judgment of the Connecticut Appellate Court is printed at page A-2 of the petition.

JURISDICTION

As discussed herein, the Petitioner has failed to demonstrate that he has raised a substantial federal question, or that the Connecticut Supreme Court has decided a federal question inconsistent with the holdings of this Court. Rule 10.1(a). This Court is without jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner failed to make any constitutional claims in the trial court.

CONNECTICUT PRACTICE BOOK
SECTIONS INVOLVED

Section 236. Disclosure of Defense

In any action to foreclose or discharge any mortgage or lien or to quiet title, or in any action upon any written contract, in which there is an appearance by an attorney for any defendant, the plaintiff may at any time file and serve in accordance with Sec. 120 a written demand that such attorney present to the court, to become a part of the file in such, a writing signed by him stating whether he has reason to believe and does believe that there exists a bona fide defense to the plaintiff's action and whether such defense will be made, together with a general statement of the nature or substance of such defense. If the defendant fails to disclose a defense within five days of the filing of such demand, the plaintiff may file a written motion that a default be entered against the defendant by reason of the failure of the defendant to disclose a defense. If no disclosure of defense has been filed, the court may order judgment upon default to be entered for the plaintiff at the time the motion is heard or thereafter, provided that in either event a separate motion for such judgment has been filed. The motions for default and for judgment upon default may be served and filed simultaneously but shall be separate motions.

Section 4009. Time to Appeal

The party appealing shall, within twenty days, except where a different period is provided by statute, from the issuance of notice of the rendition of the judgment or decision from which the appeal is taken file an appeal in the manner prescribed by Sec. 4012; but if within the appeal period any motion is filed which, if granted, would render the judgment or decision ineffective, as, for example, a motion to open the

judgment or to set aside the verdict or for judgment notwithstanding the verdict, the period of time for filing an appeal shall commence from the issuance of notice of the decision upon the motion or the expiration of the time within which a remittitur is ordered filed.

If an application for waiver of fees, costs and security is filed pursuant to Sec. 4016 within the time for taking an appeal as described above or as extended pursuant to Sec. 4040(a), the appeal period shall commence upon the issuance of notice of the decision on the application.

If the appeal in a criminal case is from a judgment of conviction, notice of the judgment shall be deemed to have issued when sentence is pronounced in open court. In a civil case, notice of the judgment shall be deemed to have issued when either the verdict is accepted in a jury case, or judgment is rendered in a non-jury case, in open court. If notice of the rendition of the judgment or decision is by mail, such judgment shall be deemed to have been rendered on the date it is mailed to the parties by the clerk.

The time for filing the appeal or for taking any of the steps necessary to prosecute or defend the appeal, as hereinafter provided, may be extended in accordance with the provisions of Sec. 4040.

STATEMENT OF THE CASE

On February 27, 1991 the Respondents commenced this action by writ, summons and complaint in the Superior Court of the State of Connecticut to foreclose a mortgage from the Petitioner to the Respondents. On August 12, 1991, the trial court entered a judgment of foreclosure by sale and appointed a committee to conduct the sale. The petitioner filed both a pro se appearance and an appearance through counsel, and his counsel was present at the hearing when the Court entered judgment. The Court issued its notice of judgment on August 19, 1991, and the Petitioner thereafter had 20 days to appeal that judgment to the Connecticut Appellate Court. Practice Book Section 4009. The Petitioner did not appeal the judgment.

On September 18, 1991, the Petitioner conveyed all of his right, title and interest in the subject property to Performance Realty, Inc., an entity which is not a party to this action. The deed is an exhibit in the trial court proceedings .

On June 27, 1992, the trial court entered post-judgment orders approving the committee's sale of the property and the committee's related activities.

The Petitioner claims that when the trial court entered judgment on August 12, 1992 that his counsel ". . . repeatedly sought to persuade the trial court to consider Petitioner's defenses . . . . The trial court issued said judgment of foreclosure by sale notwithstanding the protestations of Petitioner's counsel." Petition at pages 12-13. "Petitioner at all times objected to the foreclosure and sought to have special defenses considered and adjudicated in said foreclosure proceedings." Petition at pages 11-12.

Petitioner's representations are clear misstatements of fact and are brought to the Court's attention pursuant to Rule 15. The Petitioner neglected to append the transcript of the proceedings on August 12, 1991 to his petition. That transcript is reprinted at Appendix A of this brief. It makes clear that no defenses were asserted by Petitioner's counsel at the hearing. The primary concern of Petitioner's counsel was that the judgment be one of foreclosure by sale rather than a strict foreclosure because the Petitioner allegedly had equity in the property. Petitioner's counsel was also concerned about the date of the foreclosure sale and reached an agreement to extend that date beyond the one proposed by Respondents' counsel. At no time did Petitioner's counsel bring to the attention of the court the existence of any alleged defenses, let alone attempt to adjudicate those defenses.

The court defaulted the petitioner for failure to disclose a defense. Practice Book Section 236. The trial court was justified in finding that Petitioner's acquiescence in the entry of a judgment was tantamount to a withdrawal of any defenses which may have previously been filed. The notice of judgment specifically states that "all appearing defendants are defaulted for failure to disclose/plead". Appendix B. His statement on page 5 of his petition that judgment entered on the basis of his failure to appear is incorrect; he appeared both pro se and by counsel and was represented in court when judgment entered. See, Appendix A. The Court entered judgment because the Petitioner appeared and did not object to a judgment of foreclosure by sale, notwithstanding any defenses which he may have previously filed but waived at the hearing.

CONNECTICUT APPELLATE COURT PROCEEDINGS

After the committee sale took place the Petitioner filed an appeal to the Connecticut Appellate Court appealing from "the Court's granting of committee's motions and denying defendant's objections". The Connecticut Appellate Court then granted the Respondents' motion to dismiss the appeal which is printed at page A-3 of the appendix to the petition, and denied his motion for reconsideration and for an oral hearing, printed at page A-4 of the petition. Both orders were entered without written opinion.

CONNECTICUT SUPREME COURT PROCEEDINGS

The Petitioner sought certification from the Connecticut Supreme Court to appeal from the judgment of the Appellate Court, which petition was denied, again without written opinion. The order is printed at page A-2 of the petition.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER'S ATTEMPT TO RAISE DUE PROCESS ARGUMENTS REGARDING THE ENTRY OF THE JUDGMENT IN AN APPEAL FROM A POST-JUDGMENT ORDER APPROVING THE ACTIVITIES OF THE FORECLOSURE COMMITTEE IS UNTIMELY.

The trial court issued its notice of the entry of a judgment of foreclosure by sale on August 19, 1991. Under Practice Book Section 4009 Petitioner had 20 days to appeal that judgment to the Connecticut Appellate Court. Petitioner did not take a timely appeal. Rather, he has appealed from the Court's post-judgment orders approving the activities of the Committee for Sale, and seeks to litigate due process claims arising from the trial court's action in entering the original judgment. His appeal is clearly untimely. Connecticut law provides the Petitioner with sufficient process to have the trial court's actions reviewed (an appeal as a matter of right, Practice Book Section 4009), and he did not avail himself of that opportunity. He has waived his due process arguments.

II. THE PETITIONER, HAVING CONVEYED ALL OF HIS RIGHT, TITLE AND INTEREST IN THE SUBJECT PROPERTY, WAS NOT AGGRIEVED BY THE TRIAL COURT'S POST-JUDGMENT ORDERS AND HAS NO STANDING TO APPEAL FROM THEM.

After the entry of a judgment of foreclosure by sale, the Petitioner conveyed all of his right, title and interest in the mortgaged property to a third party. The Petitioner's appeal from the trial court's post-judgment approval of the committee sale and the committee's activities is an appeal in which he has no interest. He is not aggrieved by those activities of the committee and has no standing to appeal from them since they all concern the sale of property in which he has voluntarily relinquished his interest.

III. THE PETITIONER FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN HIS PETITION.

Petitioner did not raise any arguments based on federal law in the trial court, and in his appeal he did not make a specific claim of a deprivation of any federally protected right. The Petitioner clearly waived and failed to preserve his right to assert defenses to the foreclosure action, and failed to timely appeal the court's entry of judgment. There is no substantial federal question presented by his petition and it should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted,

ROBERT E. HOUSTON, PRO SE
51 Verville Road
Avon, CT 06001

LEE ANN HOUSTON, PRO SE
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Avon, CT 06001

No. 92-1859

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GEORGE KRAWSHUK,

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LEE ANN HOUSTON,

Respondents.

APPENDIX

APPENDIX A - PROCEEDINGS AT ENTRY OF JUDGMENT ON AUGUST 12, 1991

DOCKET NO. CV 91-0391250S : SUPERIOR COURT

ROBERT E. HOUSTON, ET AL : HARTFORD/NEW BRITAIN

VS. : HELD AT HARTFORD

GEORGE KRAWSHUK, ET AL : AUGUST 12, 1991

B E F O R E:

THE HONORABLE JAMES D. O'CONNOR, J.

A P P E A R A N C E:

FOR THE PLAINTIFF: FOR THE DEFENDANT:

Walter Nicksa, Esq. George Luca, Esq.

Reported by:

Theresa M. Glowinski
Certified Court Reporter

MR. NICKSA: Walter Nicksa. For the record, I represent the plaintiff in this matter.

MR. LUCA: George Luca, and I represent the defendant in this matter.

THE COURT: There is a pro se appearance as well.

MR. LUCA: We represent Mr. Krawshuk. He gave us the file back.

THE COURT: The named defendant?

MR. LUCA: Yes.

MR. NICKSA: Your honor originally began to hear this on July 22nd, at which time there was a hand-presented disclosure of defense, or disclosure of defense for the first time which the court ordered it supplemented because it didn't meet the requirement of the Practice Book for disclosure.

We have since reclaimed our motion for judgment and are back again, and as I understand it even though supplemental disclosure was filed, I don't feel it really is appropriate on the basis of the note, and counsel has indicated concern with our motion for strict foreclosure.

There, apparently, is equity in the property, some, approximately, forty thousand dollars worth, and we have no objection to the court ordering a sale, and I believe that's what counsel's primary concern is.

MR. LUCA: Your honor, the strict foreclosure action would, obviously, impede the asset that my client has, and interest that my client has in the property in that the plaintiff's appraisal was at one-twenty, and the note is for eighty thousand dollars; therefore, my client is losing about forty thousand dollars worth of equity.

THE COURT: Any other debts?

MR. LUCA: Not that I know of.

MR. NICKSA: The property mortgage is subsequent to other mortgages on the property; however, it's the plaintiff's responsibility to clear title to that. It's going to make it a difficult process for the committee to sell, I suspect, under the circumstances. But, on the face of the matter the property is worth one hundred twenty thousand dollars, and the debt is slightly over eighty thousand dollars at the present time. The only other items that take priority, as far as the plaintiff and defendant are concerned, are some unpaid real estate taxes, approximately, four to five thousand dollars, and a Mechanic's lien for twenty-five hundred dollars may no longer be valid but certainly it appears on the land record at this time.

MR. LUCA: Your honor, I must state my client is trying to refinance and has made application to refinance in order to pay Mr. Houston, the plaintiff, the debt that he owes.

THE COURT: Let me put on the record the affidavit of July 22nd, 1991, the affiant Robert Houston, and Lee Houston, indicating the principle, seventy-two thousand,

interest to July 22nd, eight thousand one forty-eight, and late charges three hundred seventy-eight dollars, total eighty thousand five-twenty-six.

MR. NICKSA: In addition, your honor, twenty-one additional days since that date, per diem, twenty-eight dollars a day, five hundred eighty-eight dollars. One additional late charge, forty-two dollars, for a total due and owing of today, eighty-one thousand one-fifty-six.

THE COURT: I'll let you supplement it, but, I'm going to have a finding at this time that the debt is eighty-one thousand five hundred twenty-six dollars, per diem twenty-eight dollars. There may be additional late charges which may accrue, additional late charges.

This property looks unfinished; is that correct?

MR. LUCA: I'm sorry, your honor, I didn't hear.

MR. NICKSA: Yes, it is unfinished, your honor, partially completed. I understand the interior is substantially, although it is missing trim. The exterior is substantially unfinished. I believe that's why the appraiser went down to one hundred twenty thousand dollars.

THE COURT: You have no objection to a foreclosure by sale?

MR. NICKSA: No, I do not, your honor.

THE COURT: All right.
Requested sale date?

MR. NICKSA: October nineteenth, your honor. That would give the defendant additional time to secure financing.

MR. LUCA: Could we change that to the third week of November to get my client extended time to refinance?

MR. NICKSA: Twenty-six.

MR. LUCA: Of November, rather than October, to give him added time to obtain refinancing.

THE COURT: You mean early November? How about November second?

MR. NICKSA: That's fine, your honor.

MR. LUCA: November second.

THE COURT: And at this time it's the Hartford Courant on the twenty-seventh of October.

Down payment twelve thousand dollars, and premium for liability insurance, and for attorney fees---

MR. NICKSA: Your honor, we would request two thousand dollars. This is the third time we have been in court on this matter, plus it's a sale.

MR. LUCA: We agree, your honor. We agree two thousand dollars--

THE COURT: Appraisal fee, one hundred fifty dollars. Title search one hundred fifty. Anything else?

MR. NICKSA: Will the court be naming a committee later?

THE COURT. Yes.

MR. NICKSA: I have nothing further, your honor.

MR. LUCA: Thank you, your honor.

MR. NICKSA: Thank you.

THE COURT: You're welcome.

(Whereupon the proceeding was terminated.)

CERTIFICATION

I hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled case heard before the Honorable James D. O'Connor, Judge of the Superior Court, for the Judicial District of Hartford/New Britain, held at Hartford, Connecticut, on August 12, 1991.

Dated at Hartford, Connecticut, this tenth day of December 1991.

_____

Theresa M. Glowinski
Certified Court Reporter

APPENDIX B - NOTICE OF JUDGMENT

STATE OF CONNECTICUT

No. 391250	: SUPERIOR COURT
ROBERT HOUSTON	: HARTFORD/NEW BRITAIN JUDICIAL DISTRICT
VS.	: at HARTFORD
GEORGE KRAWSHUK	: AUG. 12, 1991

Judgment of Foreclosure by Sale entered by the Court, O'Connor J., on the above date.

Debt: $80,526.00 as of 7/22/91 Appraisal fee: $250.00

Counsel fees: $ 2,000.00 Title fee: $150.00

TOTAL $82,526.00

Terms of sale:

Committee: David Curry, Esq. of the Town of Hartford
Sale date: November 2, 1991, at Noon

Appraisers:

1. Donald Stern, of the Town of Farmington
2. Wallace Inkpen, of the Town of Manchester
3. Frank Jacobs, of the Town of Hartford

Return of appraisers by October 8, 1991.
Deposit: $12,000.00, by cash, certified or banker's check.
Not required to be posted if plaintiff is successful bidder.

Publication: Hartford Courant, on October 20 and 27, 1991.

Sign: To be posted on the premises on October 8, 1991.

Committee authorized to procure liability insurance for date of sale, at a premium not to exceed $250.00.

All nonappearing defendants are defaulted for failure to appear; all appearing defendants are defaulted for failure to disclose/plead.

L.A. Cohn

_____

Assistant Clerk